

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
Marcus Cable Associates, LLC d/b/a)	CSR-5943-E
Charter Communications)	
)	
Petition for Determination of Effective)	
Competition in Various Wisconsin Communities)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: September 26, 2002

Released: September 30, 2002

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Marcus Cable Associates, LLC d/b/a Charter Communications ("Charter") has filed with the Commission a petition alleging that Charter is subject to effective competition from competing service providers in ten communities in Wisconsin (collectively, the "Communities").¹ Charter alleges that its cable systems serving the Communities are subject to effective competition, pursuant to Section 623(a)(1) of the Communications Act of 1934, as amended ("Communications Act"),² and Sections 76.7(a)(1) and 76.905(b)(2) of the Commission's rules, and seeks revocation of the certifications to regulate basic cable service rates of the local franchising authorities in the Communities.³ Charter bases its allegation of effective competition on the competing services provided by two direct broadcast satellite ("DBS") providers, DirecTV, Inc. ("DirecTV") and EchoStar Communications Corporation ("EchoStar"). No opposition to the petition was filed.

II. DISCUSSION

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,⁴ as that term is defined by Section 76.905 of the Commission's rules.⁵

¹ The Communities and corresponding Community Unit Identifiers are: Elkhorn (WI0258); Marshfield (WI0029); Medford (WI0352); Mt. Horeb (WI0435); New Holstein (WI0299); Oconomowoc (WI0360); Princeton (WI0326); Ripon (WI0153), Stoughton (WI0036) and Two Rivers (WI0315).

² 47 U.S.C. § 543.

³ 47 C.F.R. § 76.905(b)(2).

⁴ 47 C.F.R. § 76.906.

⁵ 47 C.F.R. § 76.905.

The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area. Based on the record in this proceeding, Charter has met this burden.

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if its franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors ("MVPD") each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds fifteen percent of the households in the franchise area.⁶

4. Turning to the first prong of this test, DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in a franchise area are made reasonably aware that the service is available.⁷ Charter has provided evidence of the advertising of DBS service in news media serving the Communities.⁸ We find that the programming of the DBS providers satisfies the Commission's program comparability criterion because the DBS providers offer more than 12 channels of video programming, including more than one non-broadcast channel.⁹ Charter has demonstrated that the Communities are served by at least two unaffiliated MVPDs, namely the two DBS providers, each of which offers comparable video programming to at least 50 percent of the households in the franchise area. Charter has also demonstrated that the two DBS providers are physically able to offer MVPD service to subscribers in the Communities, that there exists no regulatory, technical, or other impediments to households within the Communities taking the services of the DBS providers, and that potential subscribers in the Communities have been made reasonably aware of the MVPD services of DirecTV and EchoStar.¹⁰ Therefore, the first prong of the competing provider test is satisfied.

5. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area. Charter also sought to determine the competing provider penetration in its franchise areas by purchasing a report from SkyTrends that identified the number of subscribers attributable to the DBS providers in the Communities on a five-digit zip code basis.¹¹ However, rather than simply accepting SkyTrends' figures, Charter assumes that some of the DBS subscribers identified in the report may actually live in portions of the zip codes that fall outside of its franchise areas.¹² To account for such a possibility, Charter has devised a formula that compares U.S. Census household data for the Communities and the relevant zip codes in order to derive an allocation to apply against the DBS subscriber count.¹³ Charter then reduces the estimated DBS subscriber count by 10 percent to reflect the possibility that some

⁶ 47 U.S.C. § 543(l)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

⁷ *See MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

⁸ Petition at 3-4 and Exhibit 1.

⁹ *See* 47 C.F.R. § 76.905(g). *See also* Petition at 4-5 and Exhibits 2-3. Exhibit 2 contains the nationwide channel lineups of DirectTV and EchoStar and Exhibit 3 includes the channel lineups for Charter's cable systems serving the Communities.

¹⁰ Petition at 3-5.

¹¹ *Id.* at 5-6.

¹² *Id.*

¹³ *Id.* at 6 and Exhibits 5-6.

households have subscribed to both cable and DBS service and to take into account commercial or test accounts.¹⁴ The Commission believes that Charter's methodology is sound since it seeks to accurately quantify subscribers using the best available DBS subscriber data.

6. Charter asserts that it is the largest MVPD in the Communities because Charter's subscribership exceeds the aggregate DBS subscribership for each franchise area.¹⁵ Based upon the DBS subscriber penetration as indicated on Attachment A, calculated using Census 2000 household data,¹⁶ we find that Charter has demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in the Communities. Therefore, the second prong of the competing provider test is satisfied. Based on the foregoing, we conclude that Charter has submitted sufficient evidence demonstrating that its cable systems serving the Communities are subject to effective competition.

III. ORDERING CLAUSES

7. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Marcus Cable Associates, LLC d/b/a Charter Communications **IS GRANTED**.

8. **IT IS FURTHER ORDERED** that the certifications to regulate basic cable service rates in Elkhorn, Marshfield, Medford, Mt. Horeb, New Holstein, Oconomowoc, Princeton, Ripon, Stoughton and Two Rivers, Michigan **ARE REVOKED**.

9. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.¹⁷

FEDERAL COMMUNICATIONS COMMISSION

Steven Broecker
Deputy Chief, Policy Division, Media Bureau

¹⁴ *Id.* at Exhibit 5. According to documentation previously provided to the Commission, SkyTRENDS' zip code subscriber numbers are inflated by roughly ten percent "due to dual receivers, and limited commercial and test accounts." See *Charter Communications*, DA 02-1919 at n.13 (MB rel. Aug. 6, 2002).

¹⁵ *Id.* at 5 and Exhibit 4.

¹⁶ *Id.* at 6 and Exhibit 6.

¹⁷ 47 C.F.R. § 0.283.

ATTACHMENT A

CSR-5943-E

COMMUNITIES SERVED BY MARCUS CABLE ASSOCIATES, LLC
D/B/A CHARTER COMMUNICATIONS

Communities	CUIDS	CPR*	2000 Census Households ⁺	Estimated DBS [‡] Subscribers ⁺	Charter Subscribers ⁺
Elkhorn	WI0258	33.0	2,919	963	2,000
Marshfield	WI0029	22.0	8,235	1,813	5,802
Medford	WI0362	38.3	1,947	745	1,361
Mt. Horeb	WI0435	21.7	2,228	484	1,525
New Holstein	WI0299	24.6	1,329	327	912
Oconomowoc	WI0360	19.1	4,968	949	3,599
Princeton	WI0326	27.3	576	157	450
Ripon	WI0153	16.3	2,922	477	2,505
Stoughton	WI0036	17.6	4,734	831	3,350
Two Rivers	WI0315	16.5	5,221	862	3,689

*CPR = Percent of competitive DBS penetration rate.

⁺See Petition at Exhibits 4, 5 and 6.

[‡]DBS subscriber estimate includes 10% reduction.